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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 1022

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellants,

v.

ILLINOIS CENTRAL RAILROAD, ET AL.,
Appellees.

BRIEF FOR APPELLANTS, AMERICAN BARGE LINE COMPANY, MISSISSIPPI VALLEY BARGE LINE COMPANY, AND THE MISSISSIPPI VALLEY ASSOCIATION.

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Supreme Court of the United States.

OCTOBER TERM, 1933.

No. 422.

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellants,
v.
ILLINOIS CENTRAL RAILROAD, ET AL.,
Appellees.

BRIEF FOR APPELLANTS, AMERICAN BARGE LINE COMPANY, MISSISSIPPI VALLEY BARGE LINE COMPANY, AND THE MISSISSIPPI VALLEY ASSOCIATION.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

OPINION BELOW.

The opinions below are found in the Record at Pages 117–129.

JURISDICTION.

Jurisdiction of this Court was noted October 3, 1933.

STATEMENT OF FACTS.

The appellees brought suit in the Court below to enjoin, annul and set aside an order of the Interstate Commerce Commission issued December 10, 1932, pursuant to the provisions

of the Inland Waterways Corporation Act, as amended (43 Stat. L. 360, amended 45 Stat. L. 978; U. S. C. Title 49, Sections 151, 153).

The order of the Commission was issued on application of the American Barge Line Company, 190 I. C. C. 177.

Both the report upon which the Commission bases its determination and the order are printed in the record at pages 17 and 24, respectively.

By the order the appellees were required to file and publish joint through rail and water rates in conjunction with the American Barge Line, operating on the Mississippi and Ohio Rivers between Memphis, Tennessee, and Pittsburgh, Pennsylvania.

The Inland Waterways Act, as amended in 1928, Section 3 (e), sets forth the procedure to be followed by the applicant desirous of operating an interstate commerce water carrier business in conjunction with interstate commerce carriers by rail. First, the applicant must apply for a certificate of public convenience and necessity; and when that is granted the Act provides that the Interstate Commerce Commission "shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations, and practices, * * * " and, "shall, in such order, fix reasonable minimum differentials between all-rail rates and joint rates in connection with said water service to apply until changed by order of the Commission."

The Act then proceeds to give authority to the Commission

> "Upon complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning (1) the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the Commission, or (2) the reasonableness of any minimum differentials between all rail rates and joint rates in connection with any water service; or (3) the reasonableness of any division of joint rates ordered by the Commission under the provisions of this Act; and after full hearings the Commission may make such order

with reference to any such matters as it may find to be proper and in the public interest. At any such hearing the burden of proof concerning the unreasonableness or unlawfulness of any through route, joint rate, minimum differentials between all rail rate and joint rate in connection with water service, or division of joint rates shall be upon the carrier or carriers making the complaint; and the Commission shall give the hearing and decision of such questions preference over all other questions pending before it, except such questions as are given like preference by law, and decide the same as speedily as possible."

Pursuant to the Act, the appellee, the American Barge Line Company, on March 20, 1931, applied for a certificate of public convenience and necessity to operate a barge line service on the Mississippi and Ohio Rivers between New Orleans, Louisiana, and Pittsburgh, Pennsylvania, and for establishment of through barge-rail and rail-barge-rail rates in conjunction with its water service at certain points therein named.

The hearing on the application was confined to the question whether the applicant was entitled to a certificate of public convenience and necessity to operate a waterways business. Data were presented in support of the application by the Barge Line. Neither the interested state authorities, who had been notified of the application, nor competing barge lines opposed the granting of the certificate. Rail carriers in official and Southwestern territories interposed objections at the hearing and also filed briefs in opposition to the granting of the certificate.

After hearing, the Commission, on March 11, 1932, granted the certificate. In compliance with the mandate of the Inland Waterways Corporation Act, the Commission, thereupon, prescribed through routes and joint rates between the barge line and rail carriers on certain classes of traffic and commodities between points in the territory designated in its report and order. 182 I. C. C. 521.

The Commission fixed differentials of 20% and 10% under the lowest all-rail rate contemporaneously applicable on corresponding traffic between the same points of origin and

destination. The differentials were based upon a percentage of the barge-rail route or the rail-barge-rail route over the shortest all-rail distance. 182 I. C. C. 529, 530.

In May, 1932, the American Barge Line Company petitioned for additional through routes and joint rates between certain Ohio River ports and certain points in the Southwest, via Memphis and New Orleans. The Commission, by order dated June 14, 1932, granted the petitioners' request, with the same conditions and limitations as contained in the original report and order, *supra*. 185 I. C. C. 483.

In November, 1932, the American Barge Line Company petitioned the Commission, in two applications, for supplemental orders directing the establishment of rail-barge-rail rates from all points in Arkansas, and barge-rail rates on cotton from Memphis, Tennessee, to all points in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, via the barge line between Memphis, Tennessee, and Pittsburgh, Pennsylvania, based on differentials under carload rail rates.

The applicable rail rates had been put into effect on September 1, 1932, and were lower than the rail rates in effect on the dates of the prior orders of the Commission. These lower rates had been established by the railroads because of alleged competition of truck and water carriers, and were limited to July 31, 1933.

The railroads further reduced rates in the applicable territory in November, 1932, giving as a reason therefor that the rates established on September 1, 1932, were not low enough to accomplish the desired purpose.

The railroads connecting with the barge line refused to join with it in rates based upon a differential on the low rates which had thus been established by the railroads and were then effective. Then followed the application by the American Barge Line Company requesting the Commission to enter an order requiring the rail carriers to join with the water carrier in such joint rates and through routes.

The application by the American Barge Line was filed with the Commission in November, 1932, and the Commission

issued its report and order on December 10, 1932, amending its order of March 11, 1932, and required the affected rail carriers to join with the American Barge Line Company in establishing joint rates constructed as therein provided. The order provided:

> "*It is further ordered*, That said order be and it is hereby, further amended by inserting the following paragraph between the second and third ordering paragraphs thereof:
>
> "*It is further ordered*, That said common carriers by rail, partes to the through routes hereinbefore prescribed, be, and they are hereby, directed and required to join with said American Barge Line Company in establishing on or before January 25, 1933, upon notice to this Commission and to the general public by not less than fifteen days filing and posting in the manner prescribed in Section 6 of the Interstate Commerce Act, joint rates on cotton in carloads, minimum 37,500 pounds, over barge-rail routes hereinbefore prescribed from Memphis, Tennessee, to points in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, constructed by deducting from the corresponding all-rail rate the differential of 6 cents per hundred pounds and rail-barge-rail rates from points in Arkansas to the same destinations over rail-barge-rail routes hereinbefore prescribed, subject to the minimum weights shown below and constructed by deducting from the corresponding all-rail rates the following differentials: 8 cents, minimum 25,000–40,000 pounds; 6 cents, minimum 35,000–55,000 pounds; 4 cents, minimum 50,000–80,000 pounds,
>
> "*And it is further ordered*, That in all other respects said order, as amended, shall continue in effect until the further order of the Commission."

No hearing was held before the Commission on the application upon which the order, a part of which is above quoted, dated December 10, 1932, was issued. When it passed upon the question of holding a hearing the Commission said:

> "In response to the considerable number of requests that these petitions be assigned for hearing, it should be pointed out that in *Procedure Under Barge Line Act*, 148 I. C. C. 129, after instituting a proceeding to ascertain the views of

interested parties with respect to the meaning and purpose of the Denison Act before undertaking its administration, we came to the conclusion that that Act does not authorize hearings as to the differential rates referred to therein, being 'an attempt to substitute for hearings prior to our orders establishing through routes and joint rates, fixing minimum differentials, and prescribing equitable divisions, subsequent hearings upon complaint.' The reasons for that conclusion were very fully stated in that report, are quite as applicable here, and need not be repeated. No petitions for reconsideration were thereafter filed. We further pointed out that the Act made provision for possible changes in level in the following sentence contained therein: 'Such joint routes, rates, rules, regulations, and practices may be changed by order of the Commission or by agreement of the water carriers and other participating carriers.'

"There is no provision for hearings in connection with such modifying orders, and to hold prior hearings would be inconsistent with the plain intent of the Act. In the past we have entered such orders without hearing on several occasions when the need therefor was brought to our attention. In the prior orders in this proceeding we prescribed rates on cotton applicable on shipments in any quantity corresponding to the application of the rail rates. We are now called on to change those rates insofar as they apply on carload shipments of certain minimum weights in the light of changes which have been made in the rail rates. The facts upon which we rely in this report are verified by the tariffs in our files and by information obtained in connection with other proceedings. 190 I. C. C. 179, 180."

The effective date of the establishment of the fixed rates has been extended several times by the Commission.

On January 9, 1933, the Southwestern carriers petitioned the Commission for "vacation of order, reopening, consideration by the entire Commission, hearing and dismissal of the petitions," of the American Barge Line. This petition of the carriers was denied by the Commission on January 18, 1933. In denying the petition the Commission in its order said:

"*Provided*, That the action herein is without prejudice to respondents' right to a summary hearing concerning

the reasonableness of the through routes, joint rates, and minimum differentials prescribed in the order of March 11, 1932, in said proceeding, as amended by said order of December 10, 1932, upon complaint filed as authorized by the Inland Waterways Corporation Act."

No such complaint was filed by the affected parties.

On February 2, 1933, the appellees filed a suit in the United States District Court for Delaware seeking a decree setting aside and annulling the order of the Commission dated December 10, 1932, on the ground that it was beyond the lawful power of the Commission and wholly void.

After oral argument, and briefs filed, the Court below, consisting of three judges, in its majority opinion filed June 14, 1933, authorized a final decree, and a permanent injunction setting aside, annulling and suspending the order of the said Commission upon the ground that:

> "The attempted delegation by the Congress of its power to establish rates without a public hearing is unconstitutional," and, "while it is well settled that Congress may delegate to the Interstate Commerce Commission, an administrative tribunal, the power to fix rates, provided they are just and reasonable, that result can be lawfully accomplished by the Commission only after a fair and full hearing of the carriers affected. Record 125, 126."

From that opinion an appeal was taken to this Court, and an order allowing the appeal was filed by the Court below August 9, 1933. Record page 133.

Jurisdiction was noted by this Court on October 9, 1933.

SPECIFICATIONS OF THE ASSIGNED ERRORS OF THE COURT BELOW INTENDED TO BE URGED.

The Court below erred:

(1) In deciding that Section 3 (e) of the Inland Waterways Corporation Act, as amended, U. S. Code Title 49, Chap. 5, Section 153 (e) in authorizing the Interstate Commerce Commission to establish joint rail and water rates without hearing or evidence, constitutes a delegation of pure legislative author-

ity contrary to the provisions of Article 1, Section 1 of the Constitution of the United States;

(2) In deciding that Section 3 (e) of the Inland Waterways Corporation Act, as amended, in authorizing the entry of an order and compliance therewith, without hearing, denies the parties the right to a judicial review of such order and that such action is arbitrary and unreasonable and in violation of the Fifth Amendment of the Constitution of the United States;

(3) In deciding that the constitutional right of plaintiffs below to a full and fair hearing is not complied with by the provision in Section 3 (e) of the said Act, for a subsequent hearing upon the filing of a complaint as provided for and specified in said section;

(4) In deciding that the action of the Interstate Commerce Commission in denying petitions of plaintiffs below for a hearing and in requiring joint rail and water rates to be established without such a hearing or opportunity to be heard constituted a denial of due process of law, in violation of the Fifth Amendment of the Constitution of the United States;

(5) In not deciding that the provision of Section 3 (e) of the Inland Waterways Corporation Act was a valid and constitutional exercise of the power of Congress;

(6) In not deciding that the provision in said Section 3 (e) requiring the Interstate Commerce Commission to proceed to a hearing upon the filing of a complaint by an aggrieved carrier satisfied the due process clause of the fifth Amendment of the Constitution of the United States;

(7) In not deciding that the plaintiffs below had failed to exhaust their administrative remedies and that such failure barred the granting of the relief which they sought by their bill;

(8) In not deciding that no legal rights of the plaintiffs below are affected or threatened by the said order of the Interstate Commerce Commission;

(9) In not deciding that plaintiffs below failed to allege and prove that any legal injury resulted or would result from the order of the Commission;

(10) In entering a decree setting aside the order of the Interstate Commerce Commission and enjoining the enforcement of said order;

(11) In not dismissing the bill of complaint.

THE STATUTES INVOLVED.

The provisions of the pertinent statutes necessary in determining the issues here involved are: Inland Waterways Corporation Act, as amended by the Act of May 29, 1928, Chap. 243, 43 Stat. 360; 45 Stat. 978, Chap. 891, p. 978, Section 3 (e) 1 U. S. Code, Supplement 3, Title 49, Chap. 5, Section 153 (e). Sec. 500, Transportation Act, 1920.

QUESTIONS PRESENTED.

(1) Whether the Interstate Commerce Commission has the legal authority and power under the provisions of Section 3 (e) of the Inland Waterways Corporation Act upon application to require carriers by rail to join with water carriers in joint rates and through routes.

(2) Whether a hearing must be accorded prior to the issuance of an order directing such joint rates and through routes.

(3) Whether a hearing is a sufficient guaranty against any invasion of the constitutional rights of the affected parties if it is afforded by the Interstate Commerce Commission subsequent to its order and upon complaint of any affected party, as provided in Section 3 (e) of the Act of Congress here in question.

(4) Whether any legal rights of the appellees have been invaded by the Commission's orders.

(5) Whether the appellees have alleged or proven a property right, which, by order of the Commission, might have been taken away from them in contravention of the due process clause of the Federal Constitution.

(6) Whether the appellees exhausted their remedy before the Interstate Commerce Commission prior to instituting their suit in the Court below.

ARGUMENT.

1.

THE INTERSTATE COMMERCE COMMISMISSION WAS LEGALLY AUTHORIZED AND EMPOWERED UNDER THE PROVISIONS OF SECTION 3 (e) OF THE INLAND WATERWAYS CORPORATION ACT TO ENTER THE ORDER OF DECEMBER 10, 1932; AND THE HEARING PROVIDED IN THE ACT IS A SUFFICIENT GUARANTY AGAINST ANY INVASION OF THE CONSTITUTIONAL RIGHTS OF THE AFFECTED PARTIES.

In fixing rates the Interstate Commerce Commission acts as in a legislative capacity; and when it declares a specific rate to be a reasonable and lawful rate for the future it speaks as the legislature and its act has the same force as the statute. *Arizona Grocery Company* v. *Atchison Railway*, 284 U. S. 370, 386; *Terminal R. R. Association* v. *United States*, 266 U. S. 17, 30; *Louisville and Nashville Railway Company* v. *Garrett*, 231 U. S. 298, 318; *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226.

The power to require joint rates and through routes is but the exercise of the broad powers given by the Constitution to

regulate commerce. *St. Louis S. W. Railroad Company* v. *U. S.*, 245 U. S. 136, 142, 144; *Manufacturers Railway Company* v. *U. S.*, 246 U. S. 457, 478.

Obviously, the order of the Commission dated December 10, 1932, was an act of the Commission under a mandate of the Congress and it spoke as the legislature. *Arizona Grocery Company* v. *Atchison, etc., Railway Company, supra.*

It is submitted that the Congress in the first instance could have taken the action which is set forth in the Commission's order of December 10, 1932. Instead it conferred that duty and power upon the Interstate Commerce Commission and in the exercise of that duty and power the Commission's act was that of a legislative character.

In the case of *Home Telephone Company* v. *Los Angeles*, 211 U. S. 265, the question was presented whether a hearing was essential to due process in rate making. On that question this Court held at page 278 of its opinion:

> "The appellant also contends that the ordinances fixing rates are wanting in due process of law, and therefore violate the Fourteenth Amendment of the Constitution of the United States, because the section (31) of the charter, under whose authority they were enacted, does not expressly provide for notice and hearing before action. But rate regulation is purely a legislative function and, even where exercised by a subordinate body upon which it is conferred, the notice and hearing essential in judicial proceedings and, for peculiar reasons, in some forms of taxation (see *Londoner* v. *Denver*, 210 U. S. 373) would not seem to be indispensable."

In passing it is observed that Section 3 (e) of the Inland Waterways Corporation Act here in question provides for a hearing, at once, if there are complaining parties. The Section, in effect, provides for a summary proceeding and an expedited hearing and determination, all of which the appellees could have availed themselves of under the procedure hereafter set forth before the order of the Commission here in question actually became effective.

It is plain from the reading of the Act that the appellees

could well have filed a complaint with the Commission long before the effective date of the order of December 10, 1932. After filing such complaint they could have invoked the authority of the Commission under Section 15 (7) of the Interstate Commerce Act whereby the Commission may suspend any schedule of rates pending a hearing upon the lawfulness thereof. Rule of Practice 19 of the Commission provides for such suspension upon application in writing or by telegram.

Under the procedure thus established by the Congress under the Inland Waterways Corporation Act and the Interstate Commerce Commission Act, the order of December 10, 1932, only tentatively fixed the rights of the parties and any affected parties could either have accepted the order as finally establishing their rights, or they could have filed a complaint, and, after hearing, the Commission was authorized to make such order as it should find proper and in the public interest. It is difficult to ascertain from this procedure just how any property right of the Appellees could have been impaired, and, further, even assuming that under this procedure there might conceivably have resulted some impairment of a property right, the appellees were not denied the right under general principles of jurisprudence to a judicial review of the action of the Commission.

As stated in *Bradley* v. *Richmond*, 227 U. S. 477, at page 483:

> "If the right to appear and be heard and to obtain a review should prove illusory, there would, under general principles of jurisprudence, remain the right to judicial review, if the result should violate either a right secured under the law of the State or that of the United States. This is the right which plaintiff in error has in this very case asserted. Kentucky Railroad Tax Cases, 115 U. S. 321, 335, 336."

In the case of *Buttfield* v. *Stranahan*, 192 U. S. 470, this Court had before it the question of the constitutionality of an Act of Congress which prohibited the importation of tea which did not comply with standards fixed by the Secretary of the Treasury upon recommendation of a Board which he was

authorized to appoint. The importer was required, under the Act, to submit samples of the tea for examination and comparison with the standards thus fixed. If the finding of the Examiner was protested it was referred to a Board of three United States General Appraisers, whose decision was made final. The importer was advised that the tea did not comply with the fixed standards. He did not export it within the time required under the statute and it was destroyed. An action was brought against the Collector of the Port for damages for seizure, removal, and destruction of the tea.

The importer contended: (a) that the authority to establish standards was legislative, and could not be delegated by the Congress to administrative officers; (b) that the establishment and enforcement of standards which deprived the importer of an alleged vested right to import was a deprivation of a property right without due process of law; (c) that notice and opportunity to be heard by the importer was not afforded, and the Act was therefore unconstitutional; (d) that destruction of the tea without judicial determination was condemnation of property without a hearing, and a taking thereof without due process of law.

In disposing of the question and sustaining the validity of the Act this Court said at page 493 of the opinion:

> "As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution * * *.
>
> "It is urged that there was denial of due process of law in failing to accord plaintiff in error a hearing before the Board of Tea Inspectors and the Secretary of the Treasury in establishing the standard in question, and before the General Appraisers upon the reexamination of the tea.

Waiving the point that the plaintiff in error does not appear to have asked for a hearing, and assuming that the statute did not confer such a right, we are of opinion that the statute was not objectionable for that reason. The provisions in respect to the fixing of standards and the examination of samples by Government experts was for the purpose of determining whether the conditions existed which conferred the right to import, and they, therefore, in no just sense concerned a taking of property. This latter question was intended by Congress to be finally settled, not by a judicial proceeding, but by the action of the agents of the Government, upon whom power on the subject was conferred. * * *

"The importer was charged with notice of the provisions of the law, and the conditions upon which teas might be brought from abroad with a view of their introduction into the United States for consumption. Failing to establish the right to import, because of the inferior quality of the merchandise as compared with the standard, the duty was imposed upon the importer to perform certain requirements, and to take the goods from the custody of the authorities within a period of time fixed by the statute, which was ample in duration. He was notified of the happening of the various contingencies requiring positive action on his part. The duty to take such action was enjoined upon him, and if he failed to exercise it the Collector was under the obligation after the expiration of the time limit to destroy the goods. That plaintiff in error had knowledge of the various steps taken with respect to the tea, including the final rejection by the Board of General Appraisers, is conceded. We think the provision of the statute complained of was not wanting in due process of law."

In *Dayton-Goose Creek Railway* v. *United States*, 263 U. S. 456, this Court had before it the recapture provision of the Interstate Commerce Act, Section 15–A, incorporated in the Transportation Act 1920. In passing upon an objection to the Act upon the ground that no opportunity was afforded for a judicial hearing as to whether the return fixed was a fair one, the Court said:

"It is further objected that no opportunity is given under Section 15–A for a judicial hearing as to whether the

return fixed is a fair return. The steps prescribed in the Act constituted a direct and indirect legislative fixing of rates. No special provision need be made in the Act for the judicial consideration of its reasonableness on the issues of confiscation. Resort to the Courts for such an inquiry exists under Sections 208 and 211 of the Judicial Code. It is only where such opportunity is withheld that a provision for legislative fixing of rates violates the Federal Constitution. Ohio Valley Water Company *v.* Ben Avon Borough, 253 U. S. 287."

In *Chicago* v. *O'Connell*, 278 Ill. 591, 8 A. L. R. 916, the City of Chicago sought to enjoin the State Public Utilities Commission from enforcing its order relating to the equipment and operation of street cars in Chicago. Two street railway companies and the City of Chicago contended that the order amounted to taking of their property without due process of law, as it was the result of a proceeding to which they were not parties before the Commission. On the question the Court said, 8 A. L. R. 929, 930:

"Even though the two railway companies last mentioned and the City were not made parties to the proceedings before the Commission, they were not thereby deprived of a hearing before the Commission. Section 67 of the Public Utilities Act provides:

" 'After any rule, regulation, order or decision has been made by the Commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in said action or proceeding and specified in the application for rehearing, and the Commission may grant and hold such rehearing on said matters, if in its judgment sufficient reason therefor be made to appear.'

"The provision for a review of the decision of the Commission upon the rehearing is the same as the provision for review of the original order. None of the appellees have, therefore, been deprived of a hearing upon the reasonableness of the order made by the Commission, and have not been deprived of property without due process of law."

An appeal from the above decision was dismissed by this Court, 250 U. S. 651.

There is great similarity in the questions raised in that case and the questions raised by the appellees in the instant case.

Cases of similar import are *Bragg* v. *Weaver*, 251 U. S. 57; *North Laramie Land Company* v. *Hoffman*, 268 U. S. 276; *Chicago, etc., Ry.* v. *Minnesota*, 134 U. S. 418; *Louisville & Nashville Ry.* v. *Garrett*, 231 U. S. 298, 314, 315; *Wadley Southern Ry.* v. *Georgia*, 235 U. S. 651–660; *Missouri* v. *Chicago, etc., Ry.*, 241 U. S. 533; *Oklahoma Co.* v. *Love*, 252 U. S. 331; *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287.

In *St. Louis, S. W. Ry. Co.* v. *U. S.*, 245 U. S. 136, 142, this Court in passing upon the right of the Congress to delegate power to the Interstate Commerce Commission to enter an order for through routes and joint rates, said:

> "The complaining carriers having engaged in this particular commerce, it is clear that Congress has power to regulate it. Atlantic Coast Line R. R. Co. *v.* Riverside Mills, 219 U. S. 186. No reason appears why the regulation might not take the form of compelling the substitution of a joint rate for a through rate made by a combination of local rates or by a combination of a local rate with a joint rate to an intermediate point. Cincinnati, New Orleans & Texas Pacific Ry. Co. *v.* Interstate Commerce Commission, 162 U. S. 184."

And at pages 143 and 144 of the opinion:

> "That Congress has power to authorize the Commission to enter an order for through routes and joint rates, like that here complained of, has been heretofore assumed. No reason is shown for questioning its existence now. The provisions of the Act to Regulate Commerce as amended (1887, c. 104, Secs. 1, 12, 15, 24 Stat. 379; 1906, c. 3591, Sec. 4, 34 Stat. 584; 1910, c. 309, Sec. 12, 36 Stat. 539, 552) are also appropriate to confer this authority upon the Commission."

The Congress in the Inland Waterways Corporation Act clearly delegated to the Interstate Commerce Commission the

authority which that Commission exercised in entering its order of December 10, 1932, and such a delegation of authority is consistent with the long established policy of the Congress supported by a long line of decisions of this Court.

Further, Section 500 of the Transportation Act of 1920 expressly states the policy of the Congress to be "to promote, encourage and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation." The intention of the legislature as set forth in Section 500 of the Transportation Act of 1920 is the law. 59 C. J. Sec. 568; *Edwards* v. *Morton*, 46 S. W. 792; *Cheney* v. *Cheney*, 85 A. 387; *Broward* v. *Broward*, 117 So. 691. This section has been before this Court in the case of *Chicago, R. I. and P. R. R. Co.* v. *United States*, 274 U. S. 36; *Tin Plate to Sacramento*, 140 I. C. C. 643.

The Commission, therefore, in entering its order of December 10, 1932, acted in direct compliance with the statutory expression of the Congress.

2.

THE APPELLEES HAVE NOT EXHAUSTED THEIR REMEDY BEFORE THE INTERSTATE COMMERCE COMMISSION.

Section 3 (e) of the Inland Waterways Corporation Act, as amended, clearly and without ambiguity, prescribes the action that shall be taken by the carriers regarding the establishment of through routes and differentially constructed rates between rail and water carriers. The Act gives to any carrier who is not satisfied with the order of the Commission the right to file a complaint and have an immediate hearing. That part of the Act has not been complied with by the appellees. Until they comply with that provision of the Act no one can tell whether any alleged right of theirs is invaded, or whether they may suffer any damage.

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Corporation Act give a full, complete, and adequate legal remedy to the appellees. They must avail themselves of that remedy. It is elemental that a court of equity has no jurisdiction where there is a full, complete and adequate remedy at law. If the rail carriers were dissatisfied with the order of the Commission of December 10, 1932, they should have filed a complaint with the Commission, and if there was any doubt as to the expedited hearing on that complaint the carriers may have filed a request with the Commission for a suspension of the rates pending a hearing on the complaint. The Commission has, and often exercises, its lawful right to suspend the rates pending a hearing. Certainly it is not for the rail carriers to assert that the Commission would not suspend the rates pending a hearing when they have not made any attempt whatever to comply with the provisions of the Act in an effort to bring the legal machinery of the Commission into operation so as to protect and defend any alleged legal rights which they may now assert that they have.

Under the decisions of this Court it is well established that the Constitution guarantees a right to be heard before a final determination and judgment may be lawfully entered against those whose rights or properties will be affected or impaired thereby. Undoubtedly the rates prescribed by the Commission in its order here in question may not be enforced against the appellees, over their protest, without an adequate hearing some time between the beginning of the proceedings before the Commission and the actual enforcement of the rates. We submit, however, that the right to a hearing does not carry with it the right to any particular procedure or the right to a hearing at any particular time during the course of the proceeding. This Court laid down the rule in *Crane* v. *Hahlo*, 258 U. S. 142, 147 that:

> "No one has a vested right in any given mode of procedure (Railroad Co. *v.* Grant, 98 U. S. 398, 401; Gwin *v.* United States, 184 U. S. 669, 674) and so long as a substantial and efficient remedy remains or is provided, due process of law is not denied by a legislative change. Oshkosh Water Works Co. *v.* Oshkosh, 187 U. S. 437, 439."

The Inland Waterways Corporation Act provides for a hearing; it does not prevent a judicial determination of the correctness of the order of the Commission, and, therefore, adequately protects the appellees, should they follow the procedure set forth in the Act and in the Transportation Act of 1920.

We are aware of the decision of this Court in *Missouri-Pacific Railway* v. *Tucker*, 230 U. S. 340, wherein a part of its decision in *Ex Parte Young*, 209 U. S. 123, 147, was quoted in establishing the rule that:

> "If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this Court has held such a law to be unconstitutional. Chicago, etc. Railway Co. *v.* Minnesota, 134 U. S. 418."

To the same effect was the decision in the *Ohio Valley Co.* v. *Ben Avon Borough*, 253 U. S. 287.

The latest expression on this question that we have been able to find is in *Porter* v. *Investor's Syndicate*, 286 U. S. 461. In this case the State of Montana had by statute set about to regulate the conduct of investment business within the state and had conferred jurisdiction of the adminstrative details of the law to a Commissioner which required a permit as a condition precedent to conducting investment business. The Commissioner had authority to cancel any such permit and thereby forfeiting the right to the permittee to continue business within the state.

The Investor's Syndicate had been licensed under the statute in question to do business. Its license was subsequently revoked by order of the Commissioner. The law provided that the right of review of all orders of the Commissioner was reserved to the Court. The Investor's Syndicate instead of invoking the remedy thus provided, brought suit in the Federal Court in Montana to enjoin enforcement of the Commissioner's order. The Federal statutory court in Montana, comprised of three judges, entered a decree granting the injunction. An appeal was taken to this Court from that decree.

In reversing the opinion of the lower court, this Court said:

> "We are of opinion that the appellee failed to exhaust its administrative remedy before applying to the district court for injunctive relief. The granting and revocation of permits is an exercise by the appellant of delegated legislative power. Section 4038 of the Code (supra) confers on any interested person dissatisfied with a finding or decision by the Commissioner, the right within thirty days to bring an action against him in a state district court to vacate his order and set it aside as unjust or unreasonable, and directs that on the hearing the judge 'may set aside, modify or confirm said * * * decision as the evidence and the rules or (sic) equity may require.' The section confers the right to appeal to the state supreme court from the judgment of the trial court. Clearly the function of the state district court under the statutory mandate is not solely judicial, that is, to set aside a decision of the commissioner if arbitrary or unreasonable and hence violative of constitutional rights. * * * The legislative process remains incomplete until the action of that court shall have become final. * * * And the capacity in which the court acts is none the less administrative because the proceeding is designated as a suit in equity instead of by appeal. * * * When the appellee was notified on June 22, 1931, that the rule adopted by the appellant would become effective July 22 of the same year an action could have been filed in the state court and a hearing had upon all questions of fact and law touching the propriety of the order."

We observe that these and other decisions reaffirm the rule of law that due process guarantees a hearing before some properly constituted tribunal, and at some time prior to the enforcement of the rates against the carriers. It is our firm belief that should the appellees have taken advantage of the procedure set forth in the Inland Waterways Corporation Act, they would have been amply protected against their claim of any invasion of their constitutional rights. They did not avail themselves of that procedure. They have not exhausted their remedy either before the Commission or before a judicial tribunal, which is not prohibited to them by the statutes.

They, therefore, have no standing in this Court prior to exhausting their remedy before the Commission as expressly provided in Section 3 (e) of the Inland Waterways Corporation Act.

3.

THE APPELLEES HAVE NOT ALLEGED OR ESTABLISHED A PROPERTY RIGHT WHICH BY ORDER OF THE COMMISSION WAS OR COULD BE TAKEN AWAY FROM THEM IN CONTRAVENTION OF THE DUE PROCESS CLAUSE OF THE CONSTITUTION.

There is no inherent legal right in the appellees to transport freight over rail to the complete exclusion of other forms of transportation. The Congress has never recognized any such right, and there was no such property right at common law. Indeed the Transportation Act, 1920, negatives any such right by expressly providing that one form of transportation may invate the field of another by showing convenience and necessity for greater transportation service. *Pennsylvania Railroad Company v. United States*, 40 Fed. (2d) 921.

The appellees, and each of them, allege in their bill of complaint in paragraphs 4, Sections 1 and 2 thereof, that if the order of the Commission be made effective the appellees will sustain continuing damages and substantial losses of revenue, either because the cotton in transportation, in which it now participates, will be diverted to rail-barge-rail or barge-rail routes in which it can not participate, or in which it will be deprived of the full use of its railroad, or because it will be required to participate in the transportation of cotton at rates much lower than the all-rail rates in which it now participates; that the second supplemental report and order of the Commission, here attacked, establishes improper, unlawful and unreasonable through rail-barge-rail rates and through barge-rail rates; that the said rates are not fairly or reasonably related to all-rail rates on cotton in carload lots in effect at the time the order was entered, and that the minimum differentials

prescribed by the Commission, if made effective, would result in through rail-barge-rail rates and through barge-rail rates from and to the territory therein described; that they are inlawful and unreasonably low and would result in unlawfully diverting shipments of cotton from all-rail routes participated in by the appellees to the rail-barge-rail and barge-rail routes required to be established by the Commission's order; that it would result in continuing damage to the appellees because they would be deprived of revenue that would accrue to them because of the movement in cotton in carload lots from Arkansas and Memphis, Tennessee, to the destination territory described in the order in which the appellees participated over all-rail routes.

These allegations have been denied by the appellees. There is no relevant and material evidence in the record in support of the allegation with reference to the unreasonableness of the through routes and differentially constructed rates established by the Second Supplemental Report and the order. There is no evidence to support the claim of irreparable damage. There is no evidence showing that the ultimate amount that the rail carriers will receive for their proportionate movement of the cotton between the points designated by rail-barge-rail or barge-rail, will be less than the amount that they would receive by virtue of a division of the through all-rail route. The allegations in the bill of complaint having been denied and no proof in support of the allegations having been submitted, there was nothing upon which the court below could act in granting the relief prayed for.

Moreover, the divisions provided for in the Act may be negotiated by the carriers, and if they can not agree, the Commission may fix reasonable divisions. That authority, in the Act itself, negatives the allegation of the carriers that they will be required to participate in the transportation of cotton at rates much lower than the all-rail rates in which it now participates. In the absence of proof to the contrary the Commission will be presumed to establish and fix divisions that are reasonable, and it is bound to make the divisions retroactive to the effective date of the order.

The mere fact that the rail carriers may lose traffic is immaterial to the issue here. There is no legal right vested in

them to the transportation of cotton in commerce—it is a privilege to be enjoyed so long as it lasts, and is subject to the like privilege to be accorded other transportation facilities. These appellants have been lawfully empowered, by certificate of public convenience and necessity, to participate in interstate commerce on the waterways. They enjoy an equal privilege with rail carriers in the eye of the law. Neither rail nor water carriers have the legal right to the transportation of freight in interstate commerce to the exclusion of the other. The court below was without jurisdiction to issue an injunction where no property right was involved. In a case of this kind the due process clause of the Constitution can only be brought into operation when there is allegation and proof of the taking of property or property right without due process of law.

CONCLUSION.

We respectfully submit that Section 3 (e) of the Inland Waterways Corporation Act legally authorized and empowered the Commission to enter the order here in question; that the hearing provided in the Act is a sufficient guarantee against any invasion of the constitutional rights of the affected parties; that the appellees have not exhausted their remedy before the Interstate Commerce Commission; that they have failed to invoke the procedure as prescribed in the applicable statutes; that they have failed to allege or establish any property right which was, or could have been, taken away in contravention of the due process clause of the constitution; and, therefore, the opinion of the court below should be reversed.

Respectfully submitted,

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